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2007]

SEEKING PROTECTION: RECOGNITION OF ENVIRONMENTALLY DISPLACED PERSONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

I. INTRODUCTION

There will be fifty million environmental refugees by 2010, according to experts at the United Nations University.¹ Environmental problems such as rising sea levels, desertification and weather-induced flooding have resulted in the forced migration of many people and could cause the displacement of millions more in the future.² Despite such staggering predictions, the international community has yet to offer protections for environmental refugees as it does for traditional political refugees.³

Essam El-Hinnawi first recognized the existence environmental refugees while working for the United Nations Environmental Programme.⁴ In his influential United Nations (UN) publication, El-Hinnawi defined environmental refugees as “those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by man) that jeopardized their existence and/or seriously affected the quality of their life.”⁵ Other commentators have offered a more narrow definition of environmental refugees, which distinguishes between environmental migrants and environmental refugees.⁶ Environmental refugees, according to the narrow definition, are forced to flee due to “sudden, drastic

1. See Press Release, United Nations University, Institute for Environment and Human Security, As Ranks of “Environmental Refugees” Swell Worldwide, Calls Grow for Better Definition, Recognition, Support (Oct. 11, 2005), *available at* <http://www.ehs.unu.edu/index.php/article:130?menu=44> (describing impact of growing environmental deterioration) [hereinafter UN University]. “[B]y 2010 the world will need to cope with as many as 50 million people escaping the effects of creeping environmental deterioration” *Id.*

2. See *id.* (predicting mass-displacement due to rising sea levels, expanding deserts and weather-induced flooding).

3. See *id.* (noting that environmental refugees are not recognized in international refugee conventions). For a further discussion of the Convention definition of refugee, see *infra* notes 77-85 and corresponding text.

4. See David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”*, 16 GEO. INT’L ENVTL. L. REV. 209, 210 (2004) (introducing Essam El-Hinnawi).

5. See *id.* (quoting ESSAM EL-HINNAWI, UN ENVTL. PROGRAMME, ENVIRONMENTAL REFUGEES 4 (1985)) (defining environmental refugee).

6. See *id.* at 214-15 (stating narrow definition of environmental refugee).

environmental change[s] that cannot be reversed,” whereas environmental migrants make conscious, voluntary choices to leave their countries.⁷

The 1951 United Nations Convention Relating to the Status of Refugees (the Refugee Convention or the Convention) defines a refugee as one who has a well-founded fear of persecution based on his or her race, religion, nationality, membership in a particular social group or political opinion and, because of this fear, is unwilling or unable to seek protection from his or her own government.⁸ As environmental refugees are not specifically included in the Convention definition of refugees, they remain largely unprotected by international and domestic law.⁹ Consequently, the term environmental refugees can be considered a misnomer.¹⁰ Several groups, including the Office of United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration and the Refugee Policy Group, use the term “environmentally displaced persons” (EDPs), rather than environmental refugees.¹¹

This Comment examines the mounting crisis of environmentally displaced persons, analyzes the limits of protection presently available to them and considers a potential solution to the crisis. Part II examines several of the major causes of environmental displacement: natural disasters, environmental degradation, develop-

7. See *id.* (quoting Astri Suhrke & A. Visentin, *The Environmental Refugee: A New Approach*, ECODECISION, 73-74 (September 1981)) (providing narrow definition of environmental refugee).

8. See Convention Relating to the Status of Refugees art. 1 A(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (defining refugee for purposes of United Nations Refugee Convention) [hereinafter Refugee Convention]. The United Nations defines refugees as

[Persons, who,] as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Id.

9. See *id.* (noting that environmental refugees or environmentally displaced persons (EDPs) are not included in Convention definition).

10. See Keane, *supra* note 4, at 214 (noting that term “environmental refugee” may not be appropriate). Because the Convention explicitly defines the term “refugee” and does not include in its definition people forced to flee due to environmental causes, the term “environmental refugee” may not be appropriate. See *id.*

11. See *id.* at 215 (noting term used by several refugee organizations is “environmentally displaced persons”). As it is more technically correct, for purposes of this Comment, I will use the term environmentally displaced persons, in lieu of environmental refugees.

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ment, industrial accidents and climate change.¹² Part III considers the current protections, domestic and international, available to those persons displaced by environmental disasters.¹³ Finally, Part IV discusses theories that attempt to explain a basis through which environmentally displaced persons may find protection.¹⁴

II. CAUSES OF ENVIRONMENTAL DISPLACEMENT

It is often difficult to pinpoint one specific cause of migration because the causes are intermixed.¹⁵ There are, however, several primary causes of displacement: natural disasters, environmental degradation, development, industrial accidents,¹⁶ and climate change induced flooding.¹⁷

A. Natural Disasters

The term “natural disaster” generally signifies an event that occurs as a result of an unstable natural environment, such as an earthquake, flood, hurricane or volcanic eruption.¹⁸ Natural disasters, throughout history to the present day, have accounted for much of the world’s migration.¹⁹ Moreover, natural disasters have outpaced all other types of conflict for displacing the greatest number of people.²⁰ Indeed, natural disasters affect approximately 144 million people each year.²¹

12. For a discussion of the major causes of environmental refugees, see *infra* notes 15-76 and accompanying text.

13. For a discussion of the current protection available for environmentally displaced persons, see *infra* notes 77-109 and accompanying text.

14. For a discussion of potential solutions to the looming crisis of environmentally displaced persons, see *infra* notes 110-37 and accompanying text.

15. See Keane, *supra* note 4, at 211 (describing nature of environmental displacement as not having common pattern).

16. See *id.* (stating four major causes of forced environmental migration).

17. See FRIENDS OF THE EARTH, A CITIZEN’S GUIDE TO CLIMATE REFUGEES 1 (2005), available at www.foe.org.au/download/CitizensGuide.pdf (noting climate change as cause of EDPs). Climate change, in addition to climate change induced flooding due to rising sea levels, is said to be the root cause of “increased droughts, desertification . . . [and] . . . the more frequent occurrence of extreme weather events.” *Id.* at 3.

18. See *id.* (defining “natural disasters” as events that stem from unstable environment).

19. See *id.* (noting that natural disasters account for much of world’s migration).

20. See *id.* (recognizing growing problem of natural disasters). Indeed, “[i]n 1998, for the first time since records have been kept, natural disasters accounted for the displacement of more persons worldwide than wars or other conflicts.” *Id.*

21. See FRIENDS OF THE EARTH, *supra* note 17, at 3 (stating number of persons displaced by natural disasters each year).

Natural disasters do not affect all the world's people equally; rather, natural disasters disproportionately affect the world's poorest in Africa, Asia and South America.²² In these areas of the world, the poor are forced to live in undesirable locations or areas that are not already in use.²³ This poses a problem because, more often than not, those areas not already in use are at higher risk for the effects of natural disasters; thus, the world's poorest people are, in effect, forced to live in the most dangerous areas of the world, with respect to natural disasters.²⁴

This phenomenon was apparent in several unprecedented natural disasters occurring in late 2004 and 2005.²⁵ On December 26, 2004, an underwater earthquake measuring 9.0 on the Richter scale caused a series of tsunamis in the Indian Ocean.²⁶ When the tsunamis reached land they produced catastrophic results, killing over 270 thousand people and leaving millions homeless.²⁷

At approximately the same time the Asian tsunami hit, the West African nation of Niger also faced environmental disaster.²⁸ At the end of 2004 and early 2005, a devastating drought and infestation of crop-killing locusts struck the African nation of Niger, both of which caused crop failure and subsequent famine among the already poor Nigerien population.²⁹ The UN estimated that starvation was possible for up to 3.5 million Nigeriens.³⁰

Then, on August 29, 2005, Hurricane Katrina struck the United States, which caused disastrous results.³¹ This Category Five hurricane ravaged coastal Louisiana, Mississippi, Florida and Ala-

22. See Theresa Braine, *Was 2005 the Year of Natural Disasters?* 84(1), BULLETIN OF THE WORLD HEALTH ORGANIZATION 1, 4-6 (2006), available at <http://www.who.int/bulletin/volumes/84/1/news.pdf> (observing that world's poorest people are unproportionally affected by natural disasters).

23. See *id.* (stating that poor persons are forced to live in those locations that are not already in use).

24. See *id.* at 5 (noting relationship between damage from natural disasters and poverty due to fact that poor are forced to live in most undesirable locations).

25. See UNITED NATIONS ENVIRONMENT PROGRAMME, A YEAR OF DISASTERS (2005), available at http://www.unep.org/AnnualReport/2005/Annual_Report03_A_year_of_disasters.pdf (noting significant environmental disasters in 2004-2005).

26. See MERCY CORPS, A YEAR OF DISASTERS: ACCOUNTABILITY REPORT 2005 4 (2005), available at <http://www.mercycorps.org/files/file1136507926.pdf> (noting strength of underwater earthquake that caused 2005 Asian tsunami).

27. See *id.* (describing tsunami's destruction).

28. See *id.* at 7 (explaining timing of disaster in Niger).

29. See *id.* (noting nature of Niger's disaster).

30. See MERCY CORPS, *supra* note 26 at 7 (estimating effect of disaster in Niger).

31. See *id.* at 10 (noting Hurricane Katrina struck United States with disastrous consequences).

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bama.³² The levees in place to protect New Orleans, a city primarily below sea level, gave way due to the hurricane's strength and forced the city's citizens to evacuate.³³ Hurricane Katrina displaced over 1 million persons and took more than 1300 lives.³⁴ Moreover, it destroyed 90 thousand square miles of populated lands, an area approximately the size of the United Kingdom.³⁵ The devastating impact of the hurricane rendered the area temporarily uninhabitable and those persons forced to flee became EDPs.³⁶ Indeed, Hurricane Katrina caused "the largest displacement of Americans in 150 years — if not the largest ever."³⁷

Additionally, on October 5, 2005, Hurricane Stan hit Central America causing severe flooding and mudslides in Mexico, El Salvador and Guatemala.³⁸ The storm affected Guatemala most severely where over 1 thousand people perished and thousands were displaced because their villages were swept away in the mudslides that the storm caused.³⁹ Finally, only three days after Hurricane Stan devastated portions of Central America, an earthquake, measuring 7.6 on the Richter scale, struck northern Pakistan on the Indian border.⁴⁰ The earthquake killed over 80 thousand people and displaced 3.3 million.⁴¹

B. Environmental Degradation

Long-term environmental degradation, caused by growing population, overuse of land and poor farming practices, is "becoming the most pervasive and problematic form of forced migration to

32. *See id.* (explaining Hurricane Katrina's devastation).

33. *See id.* (noting effect of Hurricane Katrina).

34. *See id.* (explaining extent of human casualty and displacement following Hurricane Katrina).

35. *See* Mercy Corps, *supra* note 26, at 10 (comparing size of affected area to size of United Kingdom).

36. *See id.* (discussing effects on area from continuing water levels).

37. *See* Peter Grier, *The Great Katrina Migration*, THE CHRISTIAN SCIENCE MONITOR, Sept. 12, 2005 (noting extent of Hurricane Katrina's effect on displacement). Steven Kleinberg, a sociology professor at Rice University, stated, in describing the displacement of persons after Hurricane Katrina, that "[the hurricane] is the biggest resettlement in American history. A whole city has been uprooted." *Id.*

38. *See* MERCY CORPS, *supra* note 26, at 13 (stating that hurricane hit Central America on October 5, 2005).

39. *See id.* (noting devastation caused by Hurricane Stan).

40. *See id.* (noting occurrence of earthquake on Pakistan/India border).

41. *See id.* (explaining death toll and displacement following Pakistani earthquake).

occur in the twentieth century.”⁴² With the current rate of environmental degradation, many commentators forecast that “forests will soon disappear, topsoil will quickly be eroded, water resources will dry up, and land shortages and overuse will be exacerbated by unsustainable population growth in just a few years.”⁴³ Currently, there are 25 million EDPs attributable to environmental degradation, and, at the current rate of degradation, that number is sure to rise.⁴⁴

The effects of long-term environmental degradation are apparent in the case of the African Sahel desert.⁴⁵ Fifty percent of the people affected by desertification throughout the world live in this area.⁴⁶ The Sahel runs from Mauritania to Somalia along the southern border of the Sahara desert.⁴⁷ As a result of excessive population growth, chronic overuse of the land and poor farming practices, the Sahel is no longer able to retain moisture, making it vulnerable to droughts, which have occurred frequently in recent years.⁴⁸ Nomadic and subsistence farmers have been forced to move southward, stripping the land as they move.⁴⁹ As a result of overuse and droughts, the Sahel area is experiencing an alarming rate of desertification.⁵⁰ At the same time, the governments of nations in the Sahel area have done little to improve the situation.⁵¹ Although it would have been possible for the governments of the Sahel-area nations to regulate agricultural techniques and food production or take measures to curb population growth, they did nothing, forcing massive displacement of each nation’s population.⁵²

42. See Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480, 484 (1998) (discussing escalating problem of environmental degradation).

43. See *id.* at 485 (explaining anticipated effects of environmental degradation on natural resources and population).

44. See *id.* (noting present number of EDPs from environmental degradation and noting potential future increase of EDPs).

45. See *id.* at 504 (noting African Sahel as example of long term environmental degradation).

46. See *id.* (stating that fifty percent of all people affected by desertification live in Sahel).

47. See Cooper, *supra* note 42, at 504 (noting location of Sahel region).

48. See *id.* at 505 (explaining Sahel’s vulnerability to drought due to overuse of land and uncontrolled population growth).

49. See *id.* at 504-05 (explaining movement of farmers in Sahel and subsequent effect on land).

50. See *id.* (noting rate of desertification in Sahel region as approximately five miles per year).

51. See *id.* at 506 (recognizing failure of Sahel-area nations to take protective measures).

52. See Cooper, *supra* note 42, at 506 (explaining governments’ roles in causing environmental degradation in Sahel region).

C. Development

Development projects, both government-sponsored and private, displace millions of people each year.⁵³ It is estimated that each year up to 10 million people are adversely affected by development projects, and an estimated 5 million people are displaced as a result of these projects.⁵⁴ For example, in China the Three Gorges Dam Project has displaced thousands and could potentially displace millions more in the future.⁵⁵ Furthermore, once the dam is completed, the water pattern will cause thousands of acres of once prosperous farmland to be flooded.⁵⁶ Such upheaval will leave the people who work this land with nothing.⁵⁷ Moreover, in response to this massive displacement, the Chinese government has done little to remedy the situation; although the government has constructed shanty towns to house the displaced, little or no additional infrastructure has been put into place.⁵⁸

D. Industrial Accidents

Industrial accidents, like natural disasters, cause sudden displacement and subsequent migration.⁵⁹ Unlike displacements caused by natural disasters, however, displacement from industrial accidents tends to be permanent in nature.⁶⁰ In recent history, there have been numerous instances of industrial accidents resulting in great numbers of EDPs.⁶¹ For example, the infamous 1984 chemical accident in Bhopal, India displaced 200 thousand peo-

53. See Suzette Brooks Masters, *Environmentally Induced Migration: Beyond a Culture of Reaction*, 14 GEO. IMMIGR. L.J. 855, 863 (2000) (noting displacement of persons by development projects).

54. See *id.* (noting number of persons affected and displaced by development projects per year).

55. See Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 2001 COLO. J. INT'L ENVTL. L & POL'Y 1, 6 (2001) (noting number of people Three Gorges Dam Project has displaced in China).

56. See *id.* (explaining extent of displacement caused by Three Gorges Dam Project).

57. See *id.* (noting effect of developmental displacement).

58. See *id.* (stating Chinese government's failure to aid those displaced by Three Gorges Dam Project).

59. See Keane, *supra* note 4, at 212 (noting common occurrence of industrial accidents and result for those affected).

60. See *id.* at 212-13 (providing instances of industrial accidents).

61. See *id.* at 212 (noting several instances where industrial accidents caused numerous EDPs).

ple.⁶² Similarly, in 1979, a nuclear accident on Three Mile Island in Pennsylvania displaced 100 thousand people.⁶³

Moreover, after the Chernobyl disaster, arguably the most often cited industrial accident causing displacement, the Soviet government forced 100 thousand people to evacuate the thirty-mile zone affected by the radiation contamination.⁶⁴ This zone will never be free from contamination and, therefore, remains uninhabitable because the half-life of radiation contamination is 25 thousand years.⁶⁵ Furthermore, the government of the former Soviet Union was largely responsible for the Chernobyl disaster.⁶⁶ Three former Soviet Ambassadors to the United States declared, in a joint statement, that

The fault and responsibility for this infamous disaster must be laid at the feet of the leaders of the former Soviet Union who, through their criminal disdain for the human needs and welfare of citizens, permitted this most devastating technogenic catastrophe. Its after effects — such as a sharp increase in mortality and morbidity figures first of all among children, the presence of dozens of thousands of environmental refugees, long-term contamination of soil and water, irreversible changes in the natural environment and ecosystems — will be felt for decades.⁶⁷

E. Climate Change

Climate change experts predict that “human-induced climate change will have ‘deleterious effects’ on ecosystems, socioeconomic systems and human welfare.”⁶⁸ The impacts of climate change are wide-reaching and devastating; included are “increased droughts, desertification, and sea level rise, along with the more frequent occurrence of extreme weather events.”⁶⁹ Fears are growing that the

62. See *id.* (noting number of EDPs Bhopal disaster caused).

63. See *id.* at 212 (noting number of EDPs after nuclear accident on Three Mile Island).

64. See Keane, *supra* note 4, at 212 (describing Chernobyl disaster).

65. See *id.* at 212-13 (noting permanence of Chernobyl displacement).

66. See Cooper, *supra* note 42, at 514-19 (finding Soviet government responsible for Chernobyl disaster).

67. See *id.* at 517-18 (quoting joint statement by former Soviet Ambassadors, which stated Soviet Union’s culpability for Chernobyl disaster).

68. See FRIENDS OF THE EARTH, *supra* note 17, at 1 (describing effect of climate change).

69. See *id.* at 3 (noting ways climate change will cause EDPs).

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effects of climate change will lead to a substantial increase in EDPs around the globe.⁷⁰

Several South Pacific island nations are under threat of uninhabitability, or even complete submersion as a result of climate change.⁷¹ Tuvalu, one of the world's most low-lying nations, is the first country whose citizens have been forced to flee its borders due to rising sea levels.⁷² The majority of Tuvalu's citizens live within three meters of sea level, which makes them extremely vulnerable to the effects of climate change.⁷³ Of Tuvalu's 11 thousand residents, 3 thousand have already been forced to flee.⁷⁴ Moreover, the people of the tiny Carteret atolls have "become the first to be officially evacuated because of climate change."⁷⁵ It is estimated that the islands will be completely submerged by 2015.⁷⁶

III. EXTENT OF CURRENT PROTECTIONS AVAILABLE TO ENVIRONMENTALLY DISPLACED PERSONS

A. Protection Under International Law

Forming a workable refugee policy was one of the most important tasks of the UN when it was formed.⁷⁷ At its formation, UN policy-makers looked at the refugee problem as temporary and, as a result, passed the Refugee Convention, which remains unchanged today.⁷⁸ The Convention states that the term refugee shall apply to:

[Persons who,] as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality,

70. See *id.* (noting fears of increased EDPs due to effects of climate change).

71. See John Vidal, *Pacific Atlantis: first climate change refugees*, GUARDIAN, Nov. 25, 2005 (noting extent of climate change from perspective of South Pacific nations).

72. See FRIENDS OF THE EARTH, *supra* note 17, at 5 (recognizing Tuvalu as first country whose citizens have fled because of rising sea levels).

73. See *id.* (stating that over half of Tuvalu's residents live within three meters from sea level).

74. See *id.* (noting that three thousand of Tuvalu's residents have fled due to rising water levels).

75. See John Vidal, *supra* note 71 (noting existence of EDPs from Carteret atolls). The government of Papua New Guinea has agreed to accept EDPs from the Carteret atolls. See *id.* Papua New Guinea will relocate the people of Carteret to a larger island, Bougainville. See *id.*

76. See *id.* (stating that Carteret atolls will be completely submerged by 2015).

77. See Nesrin Algan, *Transboundary Population Movements: Refugees, Environment and Politics*, in THE TURKISH YEARBOOK OF INTERNATIONAL RELATIONS 75, *2 (1998), www.pap-medclearinghouse.org/Pdf/trans.pdf (stating that refugee issues were major concern when UN was established).

78. See *id.* (noting passage of Refugee Convention).

membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his formal habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷⁹

The Convention became a universal tool in the protection of refugees.⁸⁰

Not long after the Refugee Convention was adopted, it became apparent that the worldwide refugee crisis was not temporary.⁸¹ Under the Convention's definition of refugee, only those persons who became refugees as a result of events that occurred before January 1, 1951 were included in the definition.⁸² The Convention was revised by the 1967 Protocol Relating to the Status of Refugees (the Protocol).⁸³ The Protocol's revisions struck the words "[a]s a result of events occurring before 1 January 1951 and . . ." and "as a result of such events" from the Convention definition.⁸⁴ Nonetheless, the Convention offers only a restrictive definition of refugee that does not cover all those in need of its protection.⁸⁵

Some commentators contend that EDPs are implicitly included under the Convention refugee definition and, thus, can avail themselves of the Convention's protections.⁸⁶ To qualify as a refugee under the Convention definition, one must have a well-founded fear of governmental persecution on account of his or her race, religion, political opinion or membership in a particular social

79. See Refugee Convention, *supra* note 8, art. A(2) (defining "refugee" for 1951 Convention).

80. See Algan, *supra* note 77, at 2 (noting significance of Refugee Convention).

81. See *id.* (stating that Refugee Convention was not adequate because refugee problem continued to grow).

82. See Refugee Convention, *supra* note 8 (limiting applicability of word "refugee" to those persons who became refugees "[a]s a result of events occurring before 1 January 1951 . . .").

83. See 1967 Protocol Relating to the Status of Refugees, art. I, Jan. 31, 1967, 19 U.S.T. 6223 (revising original Refugee Convention to apply more broadly).

84. See *id.* (removing limiting terminology from Refugee Convention).

85. See Refugee Convention, *supra* note 8, A(2) (finding no mention of EDP or environmental refugee in Refugee Convention definition). Specifically, the Refugee Convention, as modified by the 1967 Protocol, does not offer a means of protection to EDPs. See *id.*

86. See Cooper, *supra* note 42, at 501-02 (suggesting inclusion of EDPs under traditional refugee definition).

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group.⁸⁷ These commentators reason that EDPs, generally, are forced to flee for both environmental and political reasons.⁸⁸ It is argued that the requirement of governmental persecution or governmental acquiescence to persecution takes the form of “government involvement in environmental crises;” it is this governmental involvement in environmental crises that gives weight to the proposition that environmental refugees or EDPs can and should be brought within the protections of the Convention refugee definition.⁸⁹ For example, with respect to natural disasters, it is often the government that places certain groups of people at greater risk, and it is this same government that often does not properly come to the aid of disadvantaged groups.⁹⁰ Thus, some contend that “[w]ith governments playing so pertinent a role in the occurrence of environmental crises, refugees seeking refuge from the resulting environmental degradation are effectively seeking refuge from their governments”⁹¹

Furthermore, commentators argue that EDPs face the above-mentioned persecution on account of their membership in a particular social group — individuals who lack the political power to protect and preserve their environment.⁹² Commentators suggest that EDPs often live in countries where the gap between the elite minority and the remainder of the population is great and where government corruption runs rampant.⁹³ In such situations, the citizenry displaced by environmental factors is left without political leverage to address its environmental concerns.⁹⁴

Many of the countries facing large scale environmental degradation are developing nations with economies that rely heavily on foreign industry; in such a situation, the people suffering as a result

87. For a discussion of the requirements for refugee status under the Refugee Convention, see *supra* notes 77-96 and accompanying text.

88. See Cooper, *supra* note 42, at 502 (explaining that EDPs are forced to flee due to both environmental and political pressures).

89. See *id.* (arguing that because government is involved in causing environmental crises, it becomes persecutor, bringing EDPs under Refugee Convention refugee definition).

90. See *id.* (stating how governmental response puts certain groups at higher risk from natural disasters).

91. See *id.* (arguing that EDPs are not only looking for refuge from environmental disasters or degradation, but from their governments as well).

92. See *id.* at 524 (arguing that EDPs form social group, which faces governmental persecution, due to their lack of political power to protect and preserve environment around them).

93. See Cooper, *supra* note 42, at 524 (noting wealth and power disparities in countries producing EDPs).

94. See *id.* (explaining that corruption and wealth disparities leave EDPs with little or no power to change their environmental situation).

of the side effects of that industry have little, if any, influence, for example, to limit the carbon monoxide emitted by industry in order to curtail climate change and its effects on their environment.⁹⁵ Thus, EDPs must not be excluded from traditional Convention refugee status because they suffer persecution either by the government or at the government's acquiescence because of their membership in a particular social group — persons powerless to stop large-scale environmental degradation.⁹⁶

B. Protection under Regional Agreements

Regional agreements have broadened the Convention's definition of refugee.⁹⁷ One such document is the Convention Governing the Specific Aspects of Refugee Problems in Africa (African Union Convention), put forth by the African Union, which expands the Refugee Convention definition to include as refugees,

Every person who, owing to external aggression, occupation, foreign domination or *events seriously disturbing public order in either part or the whole of his country of origin or nationality*, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁹⁸

While this definition does not specifically name EDPs as refugees, it does not, on its face, exclude them, and it does significantly expand the scope of those persons entitled to legal protections as a result of forced migration.⁹⁹

Like the African Union Convention, the 1984 Cartagena Declaration on Refugees (Cartagena Declaration) offers an expansive

95. See *id.* at 525 (explaining that when nation relies on foreign investment, which contributes heavily to environmental degradation, there is little, if anything, citizenry can do to stop it).

96. See *id.* at 526 (stating claim that EDPs are included in Refugee Convention definition of refugee and therefore are entitled to protection).

97. See JoAnn McGregor, *Refugees and the Environment*, in GEOGRAPHY AND REFUGEES 161 (Richard Black and Vaughan Robinson eds., Belhaven Press 1993) (noting expansion of Refugee Convention refugee definition through regional agreements).

98. See Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 1, September 10, 1969, African Union (emphasis added) (stating expanded definition of refugee by African Union) [hereinafter African Union Convention].

99. See *id.* (noting African Union Convention definition does not expressly exclude EDPs and expands refugee definition).

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definition of refugee.¹⁰⁰ The Cartagena Declaration specifically notes the need to “consider enlarging the concept of refugee.”¹⁰¹ The Cartagena Declaration defines refugees as “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or *other circumstances which have seriously disturbed public order*.”¹⁰²

Both the expansive language of the African Union Convention and the Cartagena Declaration would seem to implicitly encompass EDPs because, when people are forcibly displaced as a result of environmental causes, “they are seeking refuge from a ‘serious disturbance of the public order.’”¹⁰³ Nevertheless, some critics argue that the protection offered by these regional agreements is insufficient because they offer only temporary protection of refugees; still, the agreements demonstrate a willingness to accept a more expansive definition of refugee that, although not originally designed to, may offer protection to EDPs.¹⁰⁴

C. Protection under Domestic Laws of the United States

Beyond traditional refugee law, the United States offers temporary protection to aliens who are present in the United States and are unable to return to their countries of residence due to “extraordinary and temporary conditions” under section 207(a) of the Immigration and Nationality Act (INA).¹⁰⁵ This relief is called Temporary Protected Status (TPS).¹⁰⁶ The Attorney General can grant TPS if “there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected.”¹⁰⁷ Although this INA provision may seem like a potential solution to the looming EDP crisis, it remains extremely lim-

100. See Cartagena Declaration on Refugees (Cartagena de Indias, 22 November 1984) OAS/SERAL/IV/II.bb, doc. 10, rev. 1 (noting expansive definition of refugee in Cartagena Declaration) [hereinafter *Cartagena Declaration*].

101. See *id.* (stating Cartagena Declaration’s intent to widen refugee definition).

102. See *id.* (emphasis added) (defining refugee under Cartagena Declaration).

103. See Cooper, *supra* note 42, at 497 (noting that African Union Convention and Cartagena Declaration implicitly cover EDPs).

104. See *id.* (noting willingness to offer more expansive protection of refugees from regional agreements).

105. See 8 U.S.C. § 1254(a)(1) (2006) (affording temporary protection to aliens).

106. See *id.* (describing temporary protection in U.S.).

107. See *id.* (noting environmental disaster can result in TPS designation).

ited in application and scope. Indeed, TPS was not designated for any nationals of countries affected by the devastating 2004 tsunami or the 2005 earthquake in India and Pakistan,¹⁰⁸ even though 2.6 million people were displaced as a result of these enormous environmental catastrophes.¹⁰⁹

IV. ENVIRONMENTALLY DISPLACED PERSONS SHOULD BE RECOGNIZED BY INTERNATIONAL LAW

It is becoming increasingly apparent that it is nearly impossible to strictly categorize types of refugees or migrants. The line between political refugees, economic migrants and EDPs cannot be clearly drawn. In 1992, at the UN Conference on Environment and Development, the UN High Commissioner for Refugees noted that “more and more people are being forced to flee for a complex combination of reasons, linked as much to population growth, poverty, famine and *environmental degradation* as to mass violations of human rights, social and ethnic tensions and armed conflict.”¹¹⁰ The Commissioner assured her audience that “[the UNHCR] is clearly concerned that environmental degradation is increasingly a cause of population movements. This relationship between refugees and the environment has long been overlooked.”¹¹¹ Recognizing the environmental causes of refugee movements and the staggering prediction of 50 million “environmental refugees” by the

108. See U.S. Citizenship and Immigration Services, Temporary Protected Status, <http://www.uscis.gov/> (follow “Services and Benefits” hyperlink; then follow “Humanitarian Benefits” hyperlink; then follow “Temporary Protected Status” hyperlink) (stating countries protected under TPS includes Burundi, El Salvador, Honduras, Liberia, Nicaragua, Somalia and Sudan). Representative Sheila Jackson-Lee (D-TX) introduced a bill, the Tsunamis Temporary Protected Status Act of 2005, to the House Committee on the Judiciary on January 4, 2005 requesting TPS designation for nationals of Sri Lanka, India, Indonesia, Thailand, Somalia, Myanmar, Malaysia, Maldives, Tanzania, Seychelles, Bangladesh and Kenya; however, the bill died in committee. See Tsunami Temporary Protected Status Act of 2005, H.R. 60, 109th Cong. (2005).

109. See Tsunamis Temporary Protected Status Act of 2005, H.R. 60, 109th Cong. (2005) (not adopted by committee) (noting number of persons displaced by Asian tsunami).

110. See Sadako Ogata, High Commissioner for Refugees, United Nations, Statement at the UN Conference on Environment and Development (June 10, 1992), available at <http://www.unhcr.org/cgi-bin/texis/vtx/admin/opendoc.htm?tbl=ADMIN&page=home&id=3ae68fcd4c> (emphasis added) (noting UNHCR’s recognition of multitude of causes of migration and refugees).

111. See *id.* (emphasizing connection between environmental degradation and refugee movements).

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year 2010,¹¹² it is time to revise the understanding of the Refugee Convention to include this burgeoning group of displaced persons.

The Convention embodies an outdated understanding of the worldwide refugee situation and is influenced heavily by restrictionist immigration principles of Western nations.¹¹³ In order to reconcile the vast discrepancy between the Convention definition of a refugee and the mounting numbers of EDPs, some scholars argue for a refugee definition based in international human rights law rather than immigration law.¹¹⁴ Under such a definition, persecution, an element required by the Convention definition of a refugee, would include human rights abuses.¹¹⁵ Such an expanded definition of persecution would embody those persons forced to migrate as a result of root environmental causes such as natural disasters, development or environmental degradation, thus offering international protections for EDPs.¹¹⁶ Additionally, it should be noted that most environmental disasters or degradation have their root cause in some type of human action, be it negligence or intentional action.¹¹⁷ As a result, if a state had a hand in causing the environmental event resulting in forced migration and failed to provide basic needs to its citizens, then this could form the basis for international protection of EDPs.¹¹⁸

The Office of the United Nations High Commissioner on Refugees extends its assistance beyond the scope of the Convention definition of refugees, thus protecting EDPs in addition to traditional political refugees.¹¹⁹ This extension has occurred independent of

112. See UN University, *supra* note 1 (predicting fifty million environmental refugees by 2010).

113. See McGregor, *supra* note 97, at 161 (quoting James Hathaway's opinion of Refugee Convention definition). Hathaway stated:

Refugee law as codified in the 1951 Convention and 1967 Protocol relating to the Status of Refugees not only continues the original rejection of the notion of comprehensive assistance for all involuntarily displaced persons, but it allies international law with a series of strategic limitations determined by Western political objectives.

Id.

114. See *id.* (noting scholarly theory regarding expansion of refugee definition by incorporating international human rights law).

115. See *id.* (explaining that persecution, under international human rights law understanding, could be read to incorporate human rights violations).

116. See *id.* (stating EDPs may be eligible for protection under Refugee Convention definition should it be interpreted alongside international human rights law).

117. See *id.* (explaining causes of environmental disasters).

118. See McGregor, *supra* note 97, at 161 (noting alternative explanation of inclusion of EDPs under Refugee Convention definition).

119. See *id.* (recognizing UNHCR does not define which groups of displaced persons or migrants it will assist by Refugee Convention definition of refugee).

the expansion of state legal obligations with respect to such refugees.¹²⁰

Moreover, several commentators suggest that reconceptualizing refugee law as temporary protection from harm may lead to a broader definition of what constitutes a refugee because it would separate the plight of refugees and their deserved protection under international human rights law from domestic immigration law.¹²¹ Contrary to the requirements of the Refugee Convention, refugee status in western nations has traditionally been associated with permanent residence; whereas, in less developed nations, including those of Africa and Latin America, temporary protection of refugees is the norm.¹²² The African Union and the Organization of American States (OAS), both of which conceptualize refugee protection as temporary, have broad definitional language regarding refugee protection.¹²³ Thus, when a nation conceptualizes refugee protection as temporary, that nation may be more likely to offer a broadened definition of what constitutes a refugee and be willing to accept a greater number of refugees,¹²⁴ thereby potentially including EDPs within the refugee definition.

It has been argued that “[i]f refugee protection is conceived as an interim mechanism of human rights protection rather than as an alternate immigration path, there is less reason for . . . states . . . to demand a narrow interpretation of the definition of those eligible for refugee status.”¹²⁵ Furthermore, evidence exists that reconceptualizing refugee protection as temporary may alleviate the tendency for some nations, primarily Western nations, to avoid

120. *See id.* (stating that expansion of UNHCR assistance programs has occurred independently of any broadening of state legal obligations towards refugees).

121. *See* Manuel Castillo & James Hathaway, *Temporary Protection*, in RECONCEIVING INTERNATIONAL REFUGEE LAW 1, 2 (1997) (reconceptualizing refugee law as temporary protection may lead to broader refugee definition). It is recognized that, should refugee law be reconceptualized as temporary, protection must be administered in a way that respects “general norms of international human rights law.” *See id.* at 7. This includes preservation of the refugees’ family, allowing refugees to have control over their own lives, and fostering interaction between the refugee and local community. *See id.* at 9-14.

122. *See id.* (stating differences in conceptualization of refugee protection between more developed and less developed states).

123. *See id.* at 4 (noting broader refugee definition in regional agreements of lesser developed areas). For a discussion of African Union and OAS refugee protection, see *supra* notes 97-104 and accompanying text.

124. *See id.* (noting that conceptualization of refugee protection as temporary may induce states to adopt broader refugee definition).

125. *See id.* (stating that temporary notion of refugee protection could lead to more liberal definition of refugee).

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their obligations under international refugee law because refugee protection has typically been, in those nations, synonymous with permanent residence.¹²⁶ Hopefully, then, “the characterization of refugee protection as both temporary and carefully managed may induce western states to dismantle some barriers to access by refugees”¹²⁷ and potentially offer protection to EDPs.

Advocates of reconceptualizing refugee protection in this way argue that, without changing protection from permanent to temporary, developed nations will continue to offer permanent admission only to a starkly small number of refugees who are in need of immediate protection.¹²⁸ Indeed, proponents claim that “[i]nsistence on the permanency of refugee admission can work against the more critical goal of granting at least basic protection to all who require it.”¹²⁹

Moreover, proponents of reconceptualization of refugee protection as temporary claim that with temporary protection it is possible for “more good to be done for more involuntary migrants than is possible by insistence on the routine permanent integration of all refugees.”¹³⁰ It should also be recognized that under such a regime, should a nation wish, there will be no impediment to granting permanent residence; however, “[t]he objective of the international refugee regime . . . should be to establish the minimally acceptable basis for granting protection to as many refugees as possible.”¹³¹

In addition, the UNHCR and world nations recognize that eventual, safe repatriation of refugees is the ideal solution to the

126. See Castillo & Hathaway, *supra* note 121, at 4 (explaining that temporary protection may cause states to be less reluctant to accept refugees). Indeed, the Danish government imposed visa restrictions on most persons coming from former Yugoslavia in October 1992, and extended controls event to Bosnians in June 1993, but it “coupled its visa restrictions with establishment of an in-region processing system in Zagreb, through which some 5000 persons from the former Yugoslavia have been able to secure temporary protection in Denmark.” Also several European countries, at the behest of the UNHCR, admitted, for temporary protection, persons from the former Yugoslavia. See *id.* at 5.

127. See *id.* (expressing hope that temporary protection may lead to broader refugee protection).

128. See *id.* (arguing that without changing refugee norms, protection will never increase).

129. See *id.* at 5-6 (stating that idea of permanent residence in refugee law does not further goal of protecting all those in need).

130. See *id.* at 6 (explaining that regime of temporary protection could lead to protection of more refugees).

131. See Castillo & Hathaway, *supra* note 121, at 6 (stating that regime of temporary protection would be only minimal standard all nations must meet).

refugee crisis.¹³² Indeed, the “UNHCR typically recommends less than 1% of the world’s refugee population for permanent resettlement in any given year.”¹³³ While permanent resettlement may be the only option for some, it must be recognized that many barriers exist for resettled refugees, such as linguistic and cultural differences.¹³⁴ Therefore, some argue that “while some refugees will always require resettlement because of particular personal or political circumstances, it is nonetheless more logical to treat resettlement as an exceptional or residual solution.”¹³⁵ The notion of temporary protection of refugees, it is argued, would offer crucial protection to refugees by cementing the international community’s commitment to their protection, while, at the same time, not “allowing the attention of the international community to be deflected from the search for solutions to the causes of flight.”¹³⁶

In conclusion, it is increasingly clear that the number of people displaced by environmental causes is growing at a rapid rate, already vastly outpacing the numbers of traditional refugees under the Convention definition.¹³⁷ Under current notions of refugee protection, which are largely espoused by Western nations, EDPs will remain largely unprotected. Without reconceptualizing modern refugee protection to include a broader definition of refugee, it seems that EDPs, potentially hundreds of millions of people, may be left without the protection they need.

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132. *See id.* (noting UNHCR’s commitment to repatriation of refugees).

133. *See id.* (stating that UNHCR recommends very few refugees for permanent resettlement).

134. *See id.* at 7 (noting problems refugees face in resettlement).

135. *See id.* (arguing that it is better to treat repatriation as exception).

136. *See* Castillo & Hathaway, *supra* note 121, at 7 (stating value of temporary protection).

137. *See* UN University, *supra* note 1 (noting United Nations University’s prediction of growth of numbers of environmental refugees).